

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TION TERRELL,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 245108

Wayne Circuit Court

LC No. 01-009570

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. The judgment of sentence reflects that defendant was sentenced to a two-year term of imprisonment for the felony-firearm conviction, to be served before and consecutive to (1) a term of 1-1/2 to 20 years for the possession with intent to deliver heroin conviction and (2) “time served” for the possession with intent to deliver cocaine conviction. At the sentencing hearing, however, the court stated that it was sentencing defendant to two years for the felony-firearm conviction, to “time served” for the possession of marijuana conviction, and to 1-1/2 to 20 years for the possession with intent to deliver cocaine conviction, and it neglected to mention the possession with intent to deliver heroin conviction. We affirm defendant’s convictions but remand for further sentencing proceedings and a correction of the judgment of sentence.

This case resulted from a drug raid conducted by the Detroit Police Department in August 2001. The prosecutor presented evidence that the police found defendant in an otherwise abandoned house, sitting on a couch with a razor blade in his hand, with quantities of cocaine, an “assault” rifle, and over \$1,300 in currency nearby, and with quantities of heroin and marijuana on his person.

Defendant was charged with possession with intent to deliver less than fifty grams of heroin, possession with intent to deliver less than fifty grams of cocaine, possession of marijuana, and felony-firearm. The jury found him guilty as charged.

I. Missing Witness

Defendant first argues that he was denied a fair trial because the prosecutor failed to produce an endorsed witness and failed also to notify the defense of the witness' unavailability until the second day of proofs.

At the beginning of the third day of trial, the prosecutor informed the court that he had intended to call two witnesses, but that one of them, Detroit Police Officer Gary Abair, was not available because he had called in sick. The prosecutor further asserted that Officer Abair's testimony would have been substantially cumulative and asked to waive his appearance. Defense counsel objected, stating, "I don't need him. But . . . [h]e's an endorsed witness. I want him," adding that "there has been testimony directly relating to him."

The trial court conducted a due diligence hearing, at which the testimony indicated that this witness had never been served with a subpoena. The trial court concluded that due diligence had not been shown and that a special instruction was appropriate. Defense counsel stated, "I want the instruction, but at some point I want the Court to entertain a directed verdict to dismiss." The court twice instructed the jury that "Police Officer Gary Abair is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

Defense counsel's reference to a motion to dismiss indicates that counsel was not asking for that remedy at the moment, but rather envisioned doing so later. Further, when the prosecutor, in response to the trial court's ruling, reiterated that the jury would be instructed that it might presume that Officer Abair's testimony would have been adverse to the prosecution, the prosecutor added, "I think that's the remedy at this point," and defense counsel responded, "I agree." Shortly thereafter, defense counsel said again, "[b]ut at the conclusion of the proofs we will revisit the directed verdict issue." In fact, at the close of proofs defense counsel made no motion to dismiss.

It is clear, then, that defense counsel declined to request a dismissal in response to the missing witness, but affirmatively agreed that the special instruction that the court twice gave was the appropriate remedy. This issue is thus waived, and any error is extinguished for appellate purposes, leaving this Court with nothing to review in the matter. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). The argument is without merit in any event.

"This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). This deferential standard likewise applies to a court's general conduct at trial. See *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989), and *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

Defendant frames this issue as one of prosecutorial misconduct and implies that the prosecutor knew earlier that the witness in question would not appear and thus sought to place the defense at a disadvantage in the matter. The record does not support this interpretation but instead demonstrates that the prosecutor's preparation had merely been deficient in this one particular.

Defendant additionally argues that the defense would not have agreed to admit certain evidence, and otherwise would have prepared differently for trial, had defense counsel known in

a more timely fashion that Officer Abair would not appear. However, concerning the heroin, cocaine, firearm, currency, and razor blade seized when defendant was arrested, other police witnesses testified to the attendant discoveries and seizures, and so testimony from Officer Abair to that effect would have been cumulative. The only true evidentiary gap created by Officer Abair's absence concerned the chain of custody of those evidentiary items, in that it was apparently he who transported them from the crime scene.

However, "a perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence." *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994). Instead, "[o]nce a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id.* at 133. Nothing in the record in this instance suggests that defense counsel had envisioned resorting to some type of "chain of evidence" tactic, or, in any event, that some irregularity had occurred that would have turned attacking the chain of custody into a special opportunity.

Concerning the defense's choice of strategy, although defendant insists that the defense would have been organized differently had Officer Abair's absence been noted earlier, defendant leaves this Court to guess what superior strategy the defense might have pursued in that event. We decline to do so. Because defendant fails to explain how the defense could have been more effectively conducted had the nonappearance of Officer Abair been known earlier and because review of the record brings no such alternative to mind, this argument is unpersuasive.

Further, it seems plain from the record that it was the prosecution, more than the defense, who suffered some disadvantage from Officer Abair's absence. Aside from the prosecution's having to make do without one of its witnesses, the trial court instructed the jury twice that it was free to presume that the absent witness' testimony would have been adverse to the prosecution. Defendant in fact gained a benefit from the irregularity of which he here complains.

For these reasons, this claim of error must fail.

II. Lesser Included Offense Instruction

Over defense counsel's objection, the trial court instructed the jury on simple possession of cocaine and heroin, as lesser included alternatives to possession with intent to deliver. Defendant argues that this denied him a fair trial.

"This Court reviews jury instructions in their entirety to determine if there is error requiring reversal." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Defendant argues both that the lesser instructions were not warranted and that their inclusion was prejudicial to him. It is difficult to follow the reasoning of either proposition.

It seems obvious on its face that if the evidence will support a finding of possession with intent to deliver, it will also support a finding of mere possession. Intent to deliver was a separate element of the main charge, and the trial court was within its rights in informing the jury that if that element alone was not satisfied, defendant might nonetheless be guilty of a lesser crime.

Defendant's suggestion that he suffered some prejudice in the matter due to jury compromise is inapt. See, generally, *People v Graves*, 458 Mich 476, 479; 581 NW2d 229 (1998) (discussing jury compromise). Indeed, the jury convicted defendant of the higher charges. Even if the lesser instructions had not been warranted, their use at trial would have invited compromise, if at all, only in the direction away from the principal charges in favor of something less severe, in other words to defendant's benefit.

For these reasons, we reject this claim of error.

III. Sentencing

Although not raised by either party, there is an irregularity with regard to the sentences in this case and we take this opportunity to correct it.

As recited above, defendant was charged with four offenses. The jury was instructed that count I was possession with intent to deliver heroin, count II was possession with intent to deliver cocaine, count III was possession of marijuana, and count IV was felony-firearm. In delivering its guilty verdict on all four charges, the jury precisely reflected this arrangement of the charges. At sentencing, however, the trial court announced sentences of (1) imprisonment for the felony-firearm and the possession with intent to deliver cocaine convictions and (2) "time served" for the possession of marijuana conviction, but it failed to acknowledge the possession with intent to deliver heroin conviction.

The judgment of sentence, in turn, lists only three convictions and sentences, incongruously labeling count II (possession with intent to deliver cocaine) as "Del. Controlled substance less than 50 grams" with a sentence of "TIME SERVED". According to the court's pronouncement at sentencing, however, the 1-1/2 to 20 year sentence applies to the possession with intent to deliver cocaine conviction, and the "time served" sentence applies to the possession of marijuana conviction.

Accordingly, we remand this case for correction of the judgment of sentence to accurately reflect the sentences announced at sentencing for the cocaine and marijuana convictions and for the court to impose a sentence for the heroin conviction.

Affirmed in part and remanded for further sentencing proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood